the terms of the castigation of Fry J. and does not merit the lenient view taken by the Court of Appeal in that case.

But however one can condemn the mistake here, one must bear in mind that since limitation does not apply it is always open to the plaintiffs to re-institute their claim by a fresh action. A new suit would then bring the whole matter again into court. In view of this it seems to me that the objection of the defendants is not as substantial as it would at first appear. Whatever injury they had suffered, it could be compensated by costs.

I therefore propose to exercise my discretion in favour of the applicant, set aside the order dismissing the action and restore it to the hearing list. The defendants will of course have all costs thrown away and of and incidental to this application and I would assure the defendants that when it comes to fixing the date for hearing, any difficulties they may have in presenting their case or gathering their witnesses will be duly considered.

Application granted.

Solicitors: *Allen & Gledhill; Skrine & Co.*

LIM AH TOH v. ANG YAU CHEE & ANOR.

[O.C.J. (Raja Azlan Shah J.) June 5, 1969]
[Kuala Lumpur — Civil Suit No. 1183 of 1965]

Negligence — Driving at excessive speed and failure to keep proper lookout — Plea of guilty to charge of inconsiderate driving — Whether admissable as evidence of negligence — Whether driver of vehicle is agent of owner — Vicarious liability of owner.

The plaintiff in this case claimed damages for the death of her son who was killed in an accident alleged to be caused by the negligence of the first defendant, the driver of a motor-van in which the deceased was a passenger. On the evidence it appeared that the first defendant was driving at an excessive speed and without keeping a proper lookout under unfavourable weather and road conditions. He pleaded guilty to a charge of inconsiderate driving in connection with the accident. At the time of the accident the first defendant and the deceased were travelling to Port Swettenham to borrow a tarpaulin which was required for the wedding of the brother of their employer, the second defendant who was the owner of the vehicle.

Held: (1) on the facts this was a clear case of travelling at an excessive speed and without keeping a proper lookout under unfavourable weather and road conditions and therefore the first defendant was *prima facie* negligent;

(2) the plea of guilty of the first defendant to the charge of inconsiderate driving was an admissible admission which supported the plaintiff's case;

(3) the journey in this case was undertaken for the purpose of the employer and therefore the employer, the second defendant was vicariously liable for the negligence of the first defendant.

Cases referred to:—

(1) *Menon* v. *Pigeonneau* [1957] M.L.J. 85.

(2) *Tan Giok Hue* v. *Lim Swee Peng* [1960] M.L.J. 190, 191.

(2) *Laurie* v. *Raylan Building Co. Ltd.* [1942] 1 K.B. 152, 154.

(4) *Richley* v. *Foull* [1965] 3 All E.R. 109, 119.

(5) *Browne* v. *De Luxe Car Services* [1941] 1 K.B. 549. 553.

(6) *Noor Mohamed* v. *Palanivelu* [1956] M.L.J. 115.

(7) *E.A. Long* v. *Wong Chin Wah* [1957] M.L.J. 163.

(8) *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753.

(9) *Wong It Yong* v. *Lim Gaw Teong* [1969] 1 M.L.J. 79, 80.

(10) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 191, 196.

(11) *Lee Chong* v. *Tan Kwee Low* [1961] M.L.J. 98.

CIVIL SUIT.

G. Tara Singh Sidhu for the plaintiff.

D.P. Vijandran for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: The first defendant while driving a motor-van belonging to the second defendant collided with an oncoming omnibus on the wrong side of the road and as a result the deceased who was a passenger in the said motor-van was killed. The plaintiff (mother of the deceased) brings this action as administratrix of his estate and on her own behalf under sections 7 and 8 of the Civil Law Ordinance, 1956. She alleges that her son's death was caused solely by the negligence of the first defendant, the servant or agent of the second defendant, thus making the latter vicariously liable for his negligence.

The defence as pleaded is two-fold: (1) a denial of negligence on the part of the first defendant and (2) the deceased caused and or induced the said negligence by compelling the first defendant to drive fast and in the circumstances the deceased knew or ought to have known that there would be a risk of injury to him and by so compelling the first defendant he impliedly consented to the said risk. The latter defence is refuted by the first defendant himself. In his evidence he testified that the deceased did not compel him to drive fast. Therefore that defence does no longer fall for consideration.

Ordinarily, both the first defendant and the deceased were employees of the second defendant who runs a plumbing business. The day in question was not a working day. They were assisting their employer with his brother's wedding arrangements. The ceremony was to be held at his house in Klang. The first defendant

who was authorised to use the motor-van for purposes of the wedding drove it to Port Swettenham in order to borrow a tarpaulin. The deceased who was also authorised to travel in it went with the first defendant. According to the first defendant the deceased wanted to see a friend in Port Swettenham. When they left it was raining heavily.

The first defendant's story is this: He says that he was following a lorry on that straight stretch of road between Klang and Port Swettenham at an even distance of 30 feet when it stopped at the 3rd mile to drop a passenger. It was drizzling and the road surface was wet. He says he was then travelling at a speed of 25 m.p.h. Visibility according to him was poor. He could only see a distance of 33 yards. He intended to overtake the lorry, so he swerved his vehicle out and when he did that he saw in front of him an oncoming omnibus travelling at a high speed. The distance between his vehicle and the oncoming bus he says was about 20-30 feet. He applied his brakes a little bit and his van skidded. He lost control of his vehicle which collided with the bus on his wrong side of the road.

Four days later he made a statement to the police. He did not mention that he was following a lorry but a motor-car. He was subsequently charged with an offence under section 304A of the Penal Code but at the end of the prosecution case the charge was amended to one of driving without due care and attention under section 36(1) of the Road Traffic Ordinance, 1958. He pleaded guilty and was fined $150.

The version of the driver of the omnibus is different. There was no oncoming lorry. It was drizzling and the visibility was good. When the said motor-van was about 20 feet from his bus it encroached into his path. He sounded his horn and as he had no alternative to avoid the accident he drove his bus into the ditch on his left side. The van skidded and hit his bus. It was then travelling between 20-25 m.p.h. although at the hearing before the magistrate he did say he was travelling at about 30 m.p.h. I do not think that would affect his credibility because it is common knowledge that in traffic accidents drivers of motor vehicles try to exaggerate their speeds.

Between the two versions I would prefer the evidence of the omnibus driver. I take it as a fact that there was no lorry at the material time and place. The statement to the police which was made some 4 days afterwards was made when there was a *lis mota* and therefore it fell far short of the truth.

When a motor vehicle collides with an oncoming vehicle on the wrong side of a straight stretch of road, that is *prima facie* evidence of negligence. See *Menon* v. *Pigeonneau* [1] and *Tan Giok Hue* v. *Lim Swee Peng.* [2] The onus is therefore upon the defendants to show that the motor-van found itself where it did without any negligence on their part.

The first defendant attributes the accident to a skid when he applied his brakes while trying to overtake the lorry in the face of the oncoming omnibus. It is now contended that the circumstances establishing that the accident was due to a skid is sufficient to displace the *prima facie* case. I do not accept that proposition. It is well-established that a skid is a neutral element. It *per se* means nothing. See *Laurie* v. *Raylan Building Co. Ltd.* [3] To displace the *prima facie* case on the ground of a skid it must be established by affirmative evidence that it happened without fault on the part of the first defendant. Putting it in another way, he would fail if he does not prove that the skid which took him to the wrong place happened without his fault; see also *Richley* v. *Faull.* [4] Assuming there was such a lorry at the material time and place, a prudent driver would not have tried to overtake the lorry unless it was reasonably safe to do so. He must keep a proper look-out of the road ahead. The evidence shows that it was not safe to overtake the lorry because an omnibus was coming from the opposite direction. He did not see the bus coming. He tried to overtake it when the omnibus was only 20-30 feet away. There was no room to overtake the lorry safely and at the same time to avoid collision with the bus. He then applied his brakes which caused the violent skid thus resulting in a collision with the bus. All the factors favouring a skid were also present i.e., the weather conditions and the wet road surface, and any motorist of reasonable prudence should have been well aware of the necessity for exercising more than the ordinary degree of care: see *Tan Giok Hue* v. *Lim Swee Peng, supra.* As was also said in *Browne* v. *De Luxe Car Services*:— [5]

> "A driver who is proceeding along a road which he knows to be slippery has imposed upon him the burden of driving with an extra degree of care."

Therefore on the 1st defendant's own version it is difficult to see in what way he has displaced the *prima facie* case.

Rejecting as I do the defence version that there was a lorry at the material time and place, there is no material which would justify my finding that it has displaced the *prima facie* case of negligence. It is a clear case of travelling at an excessive speed and without keeping a proper lookout under unfavourable weather

and road conditions. The skid happened as a result of his own default. The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed* v. *Palanivelu*;[6] *E.A. Long* v. *Wong Chin Wah*.[7]

Is the second defendant vicariously liable for the first defendant's negligence? To impute him with liability, it must be proved that the first defendant when driving the motor-van at the material time was his agent for the general purposes of the journey. The journey must be undertaken for the second defendant's purposes. It is not necessary to cite authority on the subject but the principle enunciated in *Ormrod* v. *Crosville Motor Services Ltd.*[8] which was adopted by the Federal Court in *Wong It Yong* v. *Lim Gaw Teong* [9] might be referred to. Denning L.J. (as he then was) held the owner's liability firmly on the ground of agency:—

"The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes."

Mr. Vijandran on behalf of the defendants stressed the need to keep the principle in *Ormrod's case, supra,* within its own limit. He submitted that the "owner's purposes" must be personal to him and therefore a brother's wedding does not come within that category. It seems to me that that case does not decide such a far-reaching proposition as that. I think that in the present case it has been pushed too far. In the passage cited above Denning L.J. in his usual way stated the point emphatically and concisely. If the owner has an interest or concern in the purpose for which the vehicle is being driven, that is good evidence of agency. A social or moral obligation will suffice to impute agency: see *Hewitt* v. *Bonvin* [10] *per* du Parcq L.J. at page 196.

The question which is involved in this case raises no new principles of law; it elucidates no new aspects of familiar principles; it is a mere question of the application of the principle in *Ormrod's case* to this particular case. Applying it here there can be no doubt that the first defendant was authorised by the second defendant's father, who had authority to grant it, to drive the motor-van for the purposes in which the second defendant had an interest i.e., to borrow the tarpaulin for the wedding arrangements. He had a moral obligation to see that his brother's wedding is carried through without a hitch. It therefore cannot be said that he had no interest or concern in the journey performed by the first defendant.

I cannot for one moment subscribe to the view as Mr. Vijandran wants me to that the present case is on all fours with the case of *Lee Chong* v. *Tan Kwee Low*.[11] In that case the owner had lent his car to a third party (the second defendant) to be used for purposes in which he had not the slightest interest or concern. It was a case of an outright bailment. The present case is different. The motor-van was there at the owner's house to be used for the purposes of the brother's wedding and the first defendant who is the regular driver of the said van was authorised to drive it. The owner retained possession and the right of control of the motor-van at the material time by the presence in the van of his agent.

I am satisfied that the second defendant is vicariously liable for the negligence of the first defendant.

I will hear arguments as to damages.

Order accordingly.

Solicitors: *Khoo & Sidhu; Athi Nahappan & Co.*

MERCANTILE BANK LTD. v. THE OFFICIAL ASSIGNEE OF THE PROPERTY OF HOW HAN TEH

[O.C.J. (Raja Azlan Shah J.) June 5, 1969]
[Kuala Lumpur — Originating Summons No. 280 of 1967]

Bankruptcy — Deposit of title deeds to secure loan — Failure to pay monies due — Commission of act of bankruptcy — Bankruptcy Act, 1967, s. 47 — Caveats registered against titles — Equitable rights to lien — Application to sell land — National Land Code, 1965 ss. 134, 218(1) and 330.

In this case one How Han Teh deposited documents of title over certain lands with the applicants for the purpose of securing a loan. He failed to repay the loan and judgment was obtained against him. A bankruptcy notice was issued against him but he failed to pay the monies and thus committed an act of bankruptcy. Subsequently the applicants registered caveats against the titles deposited with them as security under the provisions of section 330 of the National Land Code. A petition was subsequently filed against him and receiving and adjudication orders were made against him. The applicants applied to sell the lands by public auction. The application was opposed by the official assignee who claimed that the applicants were not the lien holders on the property as at the time of the act of bankruptcy there was no caveat entered under the National Land Code. The applicants submitted that at the time when the act of bankruptcy was committed the applicants had equitable rights to a lien in contract.

Held: at the time when the act of bankruptcy was committed the applicants had an equitable right to a lien and the trustee in bankruptcy who steps into the bankrupt's shoes, takes a title no better than him. He takes subject to the same equities as affected the property in the bankrupt's hands. The applicants have a prior interest and were entitled to an order for sale.